

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
April 29, 2008 Session

**STATE OF TENNESSEE v. JACKIE HARDIN**

**Direct Appeal from the Criminal Court for Knox County  
No. 81016A     Richard R. Baumgartner, Judge**

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**No. E2007-01171-CCA-R3-CD - Filed June 18, 2009**

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Defendant, Jackie Renae Hardin, was indicted, along with co-defendant, Jonathan Lynn Smith, on three counts of aggravated assault, a Class C felony. Defendant's case was severed from that of Mr. Smith. Following a jury trial, Defendant was found guilty of the lesser included offense of assault, a Class A misdemeanor, in counts one and two of the indictment, and of the charged offense of aggravated assault in count three of the indictment. The trial court merged the two misdemeanor assault convictions into the aggravated assault conviction and sentenced Defendant as a Range III, persistent offender, to thirteen years. In her appeal, Defendant argues that the evidence was insufficient to support her conviction of aggravated assault, and that the verdict form incorrectly characterized criminal responsibility as a lesser included offense of aggravated assault. We affirm the judgment as to aggravated assault in count 3 of the indictment. We remand the judgments in counts 1 and 2 for entry of an order reflecting that these convictions are merged with the conviction for aggravated assault.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and ALAN E. GLENN, J., joined.

Russell T. Greene, Knoxville, Tennessee, for the appellant, Jackie Hardin.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Kenneth Irvine, Jr., Assistant District Attorney General, for the appellee, the State of Tennessee.

**OPINION**

**I. Background**

Brittany Hurst testified that she was fourteen years old at the time of the offense. On August 25, 2004, she, along with her mother, Melissa Hurst Murray, and two young cousins, drove to a local

fast food restaurant for dinner between 6:00 p.m. and 6:30 p.m. Ms. Murray pulled into the line at the drive-through window. Ms. Hurst said that she saw a blue Toyota Camry in line ahead of her family and recognized Brittany Miller and Jonathan Smith as the occupants of the vehicle. Ms. Hurst said that she attended the same middle school as Ms. Miller, and that she had known Mr. Smith for a few months. Ms. Hurst and Ms. Miller had had a dispute earlier that day at school. Ms. Hurst and Ms. Miller signed a “contract” stating that the two young women would not engage in any future altercations.

Ms. Hurst said that her mother got out of the vehicle to talk to Ms. Miller about the incident at school, but Ms. Miller and Mr. Smith drove off before Ms. Murray reached their vehicle. Ms. Murray returned to her own vehicle, and the group proceeded through the drive-through line.

Ms. Hurst said that when they reached the window to pay for their order, the blue Camry entered the restaurant’s parking lot through the exit lane and pulled up to the passenger side of Ms. Murray’s vehicle where Ms. Hurst was sitting. Ms. Hurst said that John Hardin, Defendant’s husband, was driving the Camry, Defendant was in the front passenger seat, Ms. Miller was sitting in the back seat behind Mr. Hardin, and Mr. Smith was sitting behind Defendant. Mr. Smith got out of the Camry and began to yell profanities and jumped up and down. Mr. Smith approached Ms. Miller’s open car window and slapped her. Ms. Hurst said that Mr. Smith then struck her in the face with his fist.

Ms. Hurst attempted to hit Mr. Smith and eventually hit him in the neck. Ms. Murray got out of her vehicle and began fighting with Mr. Smith. Defendant exited the Camry and struck Ms. Murray in the back of the head. Ms. Murray fell to the ground. Defendant pulled Ms. Murray’s head up by her hair and struck Ms. Murray in the face with her fist several times. Ms. Hurst said that she noticed that Defendant was wearing brass knuckles on her hand.

Ms. Hurst asked Defendant to stop hitting her mother. Defendant responded, “Well, she was going to hit my f\_\_\_g daughter.” Ms. Hurst told Defendant that Ms. Murray just wanted to talk to Ms. Miller. A woman approached the group with a baseball bat, and Mr. Smith and Defendant returned to their vehicle, and Mr. Hardin drove off.

Police officers and emergency personnel arrived at the scene. Ms. Hurst said that Ms. Murray lost consciousness when Defendant first struck her in the back of the head but revived before the ambulance arrived. Ms. Hurst said that Ms. Murray was able to talk, but she was “talking weird stuff.” Ms. Hurst said that her mother spent a number of hours in the emergency room before being released.

On cross-examination, Ms. Hurst acknowledged that she and Ms. Miller had been having problems for a period of time. Ms. Hurst denied that Ms. Miller knew that Ms. Murray could be violent at times. Ms. Hurst said that Defendant lived near the fast food restaurant, and Defendant and the others arrived approximately five minutes after Mr. Smith and Ms. Miller initially drove off.

Ms. Hurst denied striking Mr. Smith first. Ms. Hurst said that she had seen brass knuckles at Defendant's house before the incident.

Ms. Murray testified that she, Ms. Hurst, and Ms. Murray's two nieces arrived at the fast food restaurant between 6:00 p.m. and 6:30 p.m. on August 25, 2004. Ms. Murray said that she noticed Ms. Miller and Mr. Smith in a blue Camry in front of her vehicle. Ms. Murray explained that Ms. Hurst and Ms. Miller had a disagreement earlier that day at school, and Ms. Murray wanted to tell Ms. Miller that she, Ms. Murray, was glad that the two young women had resolved their differences. Ms. Murray said that Ms. Miller had lived with her family for approximately one year, and Ms. Murray treated Ms. Miller like a daughter. Mr. Smith and Ms. Miller drove off before Ms. Murray could speak to them.

Ms. Murray said that the group ordered food and proceeded to the next window. The blue Camry returned and pulled in next to her vehicle. Mr. Smith got out of the car "in a rage" and was cursing. Ms. Murray said that Mr. Smith slapped Ms. Hurst, and Ms. Murray got out of her vehicle to defend her daughter. Mr. Smith struck Ms. Hurst with his fist, bruising her chin. Ms. Murray said that Ms. Hurst did not strike Mr. Smith first. Ms. Murray acknowledged that she and Mr. Smith exchanged blows, and then her next recollection was waking up in the emergency room.

Ms. Murray said that as a result of the incident, she sustained a fractured cheekbone, a broken nose, and a concussion on the lower back of her head. Ms. Murray stayed in the emergency room until approximately 6:30 a.m. Ms. Murray stated that there were still bone fragments in her cheek, and the doctor told her that her cheekbone would shatter if she were again struck on that side of her face. Ms. Murray said that the blows damaged her sinus cavity which would probably require future surgery. Ms. Murray stated that she did not have feeling in her teeth caused by the cheekbone fracture and continued to have trouble chewing on that side of her face. Ms. Murray also continued to have headaches as a result of the blow to the back of her head. Ms. Murray said that she no longer liked to have her photograph taken because her lip drooped on the side of her face where she sustained her injuries. Ms. Murray described the pain from her injuries as "excruciating."

On cross-examination, Ms. Murray said that she approached the blue Camry at a normal walking pace. Ms. Murray said that the blue Camry returned approximately ten to fifteen minutes later while Ms. Murray was waiting to pick up her order. Ms. Murray acknowledged that she was angry when she got out of her vehicle and approached Mr. Smith. Ms. Murray could not remember which of them struck the other first, but she agreed that she and Mr. Smith exchanged blows. Ms. Murray stated that she was five feet, three inches tall, and that Mr. Smith was approximately six feet to six feet, two inches tall. Ms. Murray said that Mr. Smith struck her in the face approximately two times. Ms. Murray did not remember Defendant getting out of her vehicle or approaching Ms. Murray. Ms. Murray said that she did not recollect testifying at the preliminary hearing that she saw Defendant approach her wearing brass knuckles. Ms. Murray said that all of the blows from Mr. Smith and Defendant were directed toward the left side of her face. Ms. Murray denied that Mr. Smith had stolen something from her prior to the incident or that Ms. Hurst had harassed Ms. Miller at school.

The State rested its case-in-chief, and Defendant presented her defense. Brittany Miller testified that she was ordering food at a fast food restaurant on August 25, 2004, when she looked in her rear view mirror and saw Ms. Murray running toward her vehicle with her hand balled into a fist. Ms. Miller said she was scared because prior to the incident, Ms. Murray had telephoned her house and threatened her. Ms. Miller also said that Ms. Hurst had previously attempted to run Ms. Miller's vehicle off the road. When Ms. Miller told Defendant and Mr. Hardin about the incident, Mr. Hardin said that he wanted the conflict to end, so the four of them returned to the fast food restaurant.

When the group arrived at the restaurant, Ms. Miller said that Mr. Smith jumped out of the vehicle, screaming, and walked up to Ms. Hurst. Ms. Hurst slapped Mr. Smith, and he returned the blow. Ms. Miller said that Ms. Murray got out of her vehicle and struck Mr. Smith. Ms. Murray and Mr. Smith exchanged blows approximately three times, and then Ms. Murray fell to the ground. Ms. Miller saw Ms. Murray lying on the ground. Ms. Miller said that Defendant got out of the vehicle and bent over Ms. Murray. Ms. Miller heard Defendant say, "Just don't do it, Missy. Don't do it." Mr. Hardin got out of the vehicle and said, "There's no sense in this." Mr. Hardin ordered Defendant, Ms. Miller, and Mr. Smith back into their vehicle, and the group left the fast food restaurant. Ms. Miller denied that Defendant struck Ms. Murray or that Defendant had brass knuckles.

On cross-examination, Ms. Miller said that she was driving the Camry when she and Mr. Smith first arrived at the fast food restaurant, and she acknowledged that she did not have a driver's license. Ms. Miller described various incidents when Ms. Hurst and her friends had driven repeatedly past Ms. Miller's house, screaming and throwing things, or called her on the telephone. Ms. Miller said that Ms. Hurst and her friends had tried to run Ms. Miller's car off the road. Ms. Miller said that her parents had called the police on several occasions to report the incidents.

Ms. Miller reiterated that it was Mr. Hardin's idea to return to the fast food restaurant because he wanted "to calm it down." Mr. Hardin was the only one who was supposed to get out of the vehicle, but Mr. Smith was angry. Mr. Smith got out of the car and yelled at Ms. Hurst, "Just leave my girlfriend alone." At that point, Ms. Miller stated that Ms. Hurst slapped Mr. Smith. Ms. Miller said that Mr. Hardin got out of the vehicle when Ms. Murray and Mr. Smith started fighting and yelled at Mr. Smith and Ms. Murray to stop fighting.

Ms. Miller said that after the incident, Mr. Harding drove her and Mr. Smith to her grandmother's house, and Defendant and Mr. Hardin returned to their house. Ms. Miller stated that she called the police from her grandmother's house and reported the incident.

Valerie Ridley testified that she was living with Ms. Murray at the time of the incident. Ms. Ridley said that after the preliminary hearing, Ms. Murray offered her one hundred dollars if Ms. Ridley would testify that she was with Ms. Murray on August 25, 2004, and that she saw Defendant wearing brass knuckles when she struck Ms. Murray. Ms. Ridley said that she was working that night and refused Ms. Murray's offer. Ms. Ridley said that she did not report the incident to the

police because she did not want to get Ms. Murray into trouble. Ms. Ridley stated that she and Ms. Hurst were best friends at the time of the incident, but the young women were not speaking at the time of the trial.

On cross-examination, Ms. Ridley said that Ms. Hurst knew she was at work on August 25, 2004, because Ms. Hurst called her at her place of employment and told her about the incident. At some point after the incident, Ms. Murray became angry with Ms. Ridley and made Ms. Ridley leave her house. Ms. Ridley said that she had known Ms. Miller all of her life and was still friends with Defendant and Ms. Miller. Ms. Ridley said that she told Ms. Miller about Ms. Murray's offer a few months before trial.

The State called Ms. Murray as a rebuttal witness. Ms. Murray testified that she did not offer Ms. Ridley money in exchange for her testimony at trial. Ms. Murray said that she knew that Ms. Ridley was not listed on the police report as a witness and that Ms. Ridley was at work when the incident occurred.

## **II. Sufficiency of the Evidence**

Defendant argues that the evidence was insufficient to support her conviction of aggravated assault. Relying on State v. Sims, 909 S.W.2d 46 (Tenn. Crim. App. 1995), Defendant argues that there was no evidence to support a finding that Ms. Murray suffered serious bodily injury as defined in Tennessee Code Annotated section 39-11-106(a)(34).

When a defendant challenges the sufficiency of the convicting evidence, we must review the evidence in a light most favorable to the prosecution in determining whether a rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). Once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced on appeal with a presumption of guilt. State v. Black, 815 S.W.2d 166, 175 (Tenn. 1991). The defendant has the burden of overcoming this presumption, and the State is entitled to the strongest legitimate view of the evidence along with all reasonable inferences which may be drawn from that evidence. Id.; State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The jury is presumed to have resolved all conflicts and drawn any reasonable inferences in favor of the State. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984). Questions concerning the credibility of witnesses, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

As charged in the indictment, a person commits aggravated assault who "[i]ntentionally or knowingly commits an assault as defined in § 39-13-101 and . . . [c]auses serious bodily injury to another." T.C.A. § 39-13-102(a)(1)(A). A person commits assault who "[i]ntentionally, knowingly or recklessly causes bodily injury to another." Id. § 39-13-101(a)(1). Serious bodily injury is defined

as bodily injury which involves a substantial risk of death, protracted unconsciousness, extreme physical pain, protracted or obvious disfigurement, or protracted loss or substantial impairment of a function of a bodily member, organ, or mental faculty. Id. § 39-11-106(a)(34). A defendant is criminally responsible for an offense committed by another if, “[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the [defendant] solicits, directs, aids, or attempts to aid another person to commit the offense.” Id. § 39-11-402(2).

Defendant argues that the evidence was insufficient to support a finding that Ms. Murray suffered serious bodily injury as a result of the incident and compares Ms. Murray’s injuries to those suffered by the victim in State v. Sims, 909 S.W.2d 46 (Tenn. Crim. App. 1995). In that case, the proof demonstrated that, during the course of the robbery, the defendant struck the victim once in the face with a pistol. From this blow, she suffered a broken and lacerated nose and a bruised cheekbone. Id. at 48. The victim spent about two hours in the hospital receiving immediate treatment for these wounds and was not prescribed any pain medication. Id.

On appeal, the defendant contended that the victim had not suffered the “serious bodily injury” required to support a conviction of especially aggravated robbery. This Court agreed, holding that:

The ejusdem generis canon of statutory construction is helpful when construing the enumerated definition of “serious bodily injury.” According to the Sixth Edition of Black’s Law Dictionary, ejusdem generis means when words follow an enumeration of classes of things the words should be construed to apply to things of the same general class as those enumerated. Therefore, the enumerated portions of the definition of serious bodily injury should be read as coming from the same class of injuries. We do not believe that the pain commonly associated with a broken nose is extreme enough to be in the same class as an injury which involves a substantial risk of death, protracted unconsciousness, protracted or permanent disfigurement or the loss or impairment of the use of a bodily member, organ or mental faculty.

Sims, 909 S.W.2d at 49. Accordingly, the Court modified the defendant’s conviction to aggravated robbery. See T.C.A. § 39-13-402(a)(1).

Photographs depicting Ms. Murray’s injuries were introduced at trial. She suffered numerous blows to the left side of her face which broke her nose, fractured her cheekbone, and damaged her sinus cavity. Ms. Murray testified that she continues to experience a lack of feeling in her teeth on the left side of her face as a result of nerve damage and has difficulty chewing. Ms. Murray stated that the left side of her lip droops because of the injuries, thus resulting in protracted disfigurement. Ms. Murray testified that she suffered “excruciating pain” as a result of the blows to her face and head, and she wore a neck brace for three weeks after the incident which prevented her from performing her duties at work.

The distinction between bodily injury and serious bodily injury is generally a question of fact for the jury to determine. See State v. Barnes, 954 S.W.2d 760, 765-66 (Tenn. Crim. App. 1997). Based on our review, we conclude that the proof at trial was sufficient to sustain a rational trier of fact's finding that Ms. Murray suffered serious bodily injury as a result of the assault. Defendant is not entitled to relief on this issue.

### **III. Jury Verdict Form**

Defendant argues that the language of the verdict form incorrectly characterized “criminal responsibility for aggravated assault” as a separate lesser included offense of the charged offense of aggravated assault. Because of the verdict form’s format, Defendant surmises that the jury was led to believe “that they were convicting Defendant of something less than aggravated assault.” Defendant acknowledges that she did not raise this issue at trial or in her motion for new trial, but asks this Court to review her issue under a plain error analysis.

A defendant’s failure to raise an issue in a motion for new trial ordinarily precludes appellate review. State v. Maddin, 192 S.W.3d 558, 561 (Tenn. Crim. App. 2005) (citing Tenn. R. App. P. 36(a); Tenn. R. App. P. 3(e)). Pursuant to Rule 52(b) of the Tennessee Rules of Criminal Procedure, however, we have discretion to notice an error that has affected the substantial rights of an accused when necessary to do substantial justice. State v. Adkisson, 899 S.W.2d 626, 642 (Tenn. Crim. App. 1994). In order to review an error as plain error, five factors must be present:

(a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is “necessary to do substantial justice.”

Id. at 641-42 (quoting Tenn. R. Crim. P. 52(b)) (footnotes omitted); see also State v. Smith, 24 S.W.3d 274, 283 (Tenn. 2000) (adopting the Adkisson test for determining plain error).

“[A]ll five factors must be established by the record before this Court will recognize the existence of plain error, and complete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established.” Smith, 24 S.W.3d at 283. Furthermore, for a “substantial right” of the accused to have been affected, the error must have prejudiced the defendant. “In other words, it must have affected the outcome of the trial proceedings.” Maddin, 192 S.W.3d at 562.

The verdict form, in pertinent part, reads as follows:

### **THIRD COUNT**

We the Jury, find the defendant (guilty) (not guilty) [circle one] of **Aggravated Assault**.

**IF YOU FIND THE DEFENDANT GUILTY OF A GREATER OFFENSE, YOU DO NOT NEED TO CONSIDER ANY OF THE FOLLOWING LESSER INCLUDED OFFENSES:**

We the Jury, find the defendant (guilty) (not guilty) [circle one] of Criminal Responsibility of Aggravated Assault.

We the Jury, find the defendant (guilty) (not guilty) [circle one] of Facilitation of a Felony, a lesser included offense.

We the Jury, find the defendant (guilty) (not guilty) [circle one] of **Reckless Aggravated Assault**, a lesser included offense.

We the Jury, find the defendant (guilty) (not guilty) [circle one] of Criminal Responsibility of Reckless Aggravated Assault.

We the Jury, find the defendant (guilty) (not guilty) [circle one] of Facilitation of a felony, a lesser included offense.

We the Jury, find the defendant (guilty) (not guilty) [circle one] of **Reckless Endangerment**, a lesser included offense.

We the Jury, find the defendant (guilty) (not guilty) [circle one] of Criminal Responsibility of Reckless Endangerment.

We the Jury, find the defendant (guilty) (not guilty) [circle one] of **Assault**, a lesser included offense.

We the Jury, find the defendant (guilty) (not guilty) [circle one] of Criminal Responsibility of Assault.

(Underlined emphasis added). The verdict form properly lists, in descending order, aggravated assault, reckless aggravated assault, reckless endangerment, and assault as lesser included offenses of aggravated assault. Facilitation of a felony is also properly listed as a lesser included offense of aggravated assault. The phrase, “a lesser included offense,” is noted where appropriate and does not appear next to the option relevant to criminal responsibility.

The trial court instructed the jury that:



The defendant is criminally responsible as a party to the offense of aggravated assault, or any lesser included offense, if the offenses were committed by the defendant's own conduct, by the conduct of another for which the defendant is criminally responsible, or by both. Each party to the offense may be charged with the commission of the offense.

The defendant is criminally responsible to an offense committed by the conduct of another if, acting with the intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the defendant solicits, directs, aids, or attempts to aid another person to commit the offense.

Before you find the defendant guilty of being criminally responsible for said offenses committed by the conduct of another, you must find that all of the essential elements of said offenses have been proven by the state beyond a reasonable doubt.

During deliberations, the jury submitted the following question to the trial court: If we find the defendant not guilty of Aggravated Assault under the Third Count but do find them [sic] guilty of Criminal Responsibility of Aggravated Assault do we still need to address Reckless Endangerment and Assault under the Third Count? The trial court responded:

The answer is no. If you find the defendant guilty beyond a reasonable doubt of Criminal Responsibility for Aggravated Assault in the third count, you do not need to consider any lesser included offenses.

The jury was clearly instructed as to the theory of criminal responsibility and was instructed that if they convicted Defendant of the charged offense of aggravated assault under a theory of criminal responsibility, they were not to proceed to consideration of the lesser included offenses. A panel of this Court recently reviewed a verdict form drafted in the same manner as that used in Defendant's trial and concluded that "despite the inartful wording of the transition language of the verdict form," the trial court's instructions when reviewed in their entirety fairly submitted the legal issues to the jury. State v. Marcus Dwayne Welcome, No. E2006-01839-CCA-R3-CD, 2007 WL 2790958, at \*3 (Tenn. Crim. App., at Knoxville, Sept. 27, 2007), perm. to appeal denied (Tenn. Feb. 25, 2008).

Based on our review, we conclude that Defendant has failed to show that the wording of the verdict form affected the outcome of the proceedings. Defendant is not entitled to relief on this issue.

## **CONCLUSION**

The trial court properly concluded that the convictions in counts 1 and 2 should merge with the conviction in count 3, but there are judgments of conviction in both counts 1 and 2. Accordingly,

the judgments in counts 1 and 2 must be remanded to the trial court for entry of an order vacating those judgments and merging the convictions with the judgment in count 3.

After a thorough review, we affirm the judgment of the trial court, as to the conviction for aggravated assault in count 3. We remand the judgments in counts 1 and 2 for an order vacating the judgments and merging the convictions therein with the judgment in count 3.

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THOMAS T. WOODALL, JUDGE